

IP 04-0157-C T/L Hawkins v Prudential
Judge John D. Tinder

Signed on 08/02/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LINDA HAWKINS,

Plaintiff,

vs.

1:04-cv-0157-JDT-WTL

PRUDENTIAL INSURANCE COMPANY OF
AMERICA, and BANK ONE
CORPORATION HEALTH and WELFARE
BENEFIT OPTIONS PROGRAM,

Defendants.

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT (DKT. NOS. 36 & 40)¹

Plaintiff, Linda Hawkins, brings this action against Defendant, Prudential Insurance Company of America (“Prudential”), under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132, seeking review of the alleged wrongful termination of benefits under a group long-term disability plan. She seeks an order awarding her benefits under the plan. The parties’ cross-motions for summary judgment raise two main issues: what standard of review should be applied, and whether, under that standard, the decision to terminate benefits should be upheld.

¹ This Entry is a matter of public record and may be made available to the public on the court’s web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

I. BACKGROUND

Prudential issued a Group Policy Number 56249 to Bank One that includes long term disability (“LTD”) coverage (the “Plan”). (Admin. R. at 1-49.) Prudential makes LTD benefit determinations under the Plan. Linda Hawkins was an employee of Bank One and, thus, was covered under the Plan. She ceased work on April 2, 2001, and submitted a claim for LTD benefits based on increased symptoms of syringomyelia caused by a motor vehicle accident on December 5, 2000.² Ms. Hawkins’ initial application for LTD benefits identifies syringomeylia as the medical condition preventing her from working. (*Id.* at 367.)

On December 8, 2000, Dr. William Gilkison examined Ms. Hawkins and wrote in his progress notes that:

[Plaintiff] was in an auto accident 3 days ago She hurt her back and her neck and [sic] are better. Neck is fine. Her back still hurts in the lumbar area and her mid thoracic area on the left . . . ROM of her back is excellent with not much in the way of pain.

(Admin. R. at 177). On January 4, 2001, Dr. Gilkison again examined Ms. Hawkins and noted “Neck normal.” (*Id.*) He examined her on February 12, 2001, and said that she had “developed numbness of her left extremities upper and lower right after the

² Syringomyelia is a disorder in which a fluid-filled cyst or syrinx forms within the spinal cord. Pain is a common symptom of syringomyelia. Other symptoms include a loss of sensation that spreads in a cape-like fashion over the shoulders and back, spastic muscles or weakness in the legs, and headaches. Syringomyelia may be diagnosed through an MRI. Cedars-Sinai, Health Conditions, Syringomyelia, <http://www.csmc.edu/5749.html> (last visited June 17, 2005).

accident,” though she had not mentioned them on prior examination. (Admin. R. at 176.) Dr. Gilkison noted that Ms. Hawkins had “no objective neurologic findings whatsoever” (*id.*) and ordered an MRI of the neck and lumbar spine. A February 21, 2001, MRI of the cervical spine revealed minimal degenerative changes and no appreciable change from a July 14, 1995, MRI. (*Id.* at 357.) The MRI also showed “Extensive thoracic cord syrinx” from T2 to T12, but no evidence of thoracic cord impingement. (*Id.*)

On March 12, 2001, Dr. Henry Feuer, a neurologist, examined Ms. Hawkins. He noted, *inter alia*, that Ms. Hawkins “had some slightly decreased sensation on the bottom of the left foot. . . [but found] no evidence of myelopathy.” (Admin. R. at 220.) He concluded based on the February 21, 2001, MRI that: “The small syrinx in the cervical area has remained unchanged. However, on her thoracic MRI scan there was noted to be a narrow syrinx extending from the mid to lower thoracic area. There is no evidence of any cord expansion or any abnormal cord signal . . .” (*Id.*) Dr. Feuer wrote:

[H]er major problem now is a probable musculoligamentous strain of the lumbosacral spine secondary to a motor vehicle accident, however, I feel that the narrow syrinx noted in the thoracic spinal cord is of no clinical significance. As you may know, we did not have a scan of the thoracic spinal cord six years ago, and more than likely it is certainly possible that syrinx might have been there.

(*Id.*) On March 23, 2001, Dr. Gilkison examined Ms. Hawkins and reported:

Linda continues to have trouble from auto accident injuries and instead of getting better, seems to be getting worse. Every time [she] comes in she has a new symptom. Today she has numbness in the bottoms of her feet[,] right greater then [sic] left. There is a burning sensation in her neck

that radiates down her spine and causes her to have headaches. . . . She had numbness in the upper and lower left extremities right after accident, but when I saw her three days later, she never mentioned it . . . Dr. Feuer . . . didn't think that any of this was related to the syrinx . . . She has been going to therapy and they are kind of throwing up their hands because seems to be getting worse instead of better . . . Because she is getting depressed. . . . I put her on Amitrptylene.

(Admin. R. at 175.) On March 28, 2001, Dr. Leo T. d'Ambrosio conducted a neurological consultative examination of Ms. Hawkins. His office notes state:

The patient . . . was rear-ended . . . [and] suffered a whiplash type injury. She immediately noted burning pain in her neck. She tried to go to work, but had increasing pain. . . . The patient developed left hand tingling about one week after the . . . accident and then she developed a tingling in her left foot about three weeks post accident. The patient has a known cervical syrinx from a motor vehicle accident 10 years ago. . . . [Ms. Hawkins] had an MRI scan of the cervical spine on February 21, which did not reveal any change in syrinx. MRI scan of the thoracic spine revealed the syrinx. MRI scan of the lumbosacral spine revealed minimal degenerative changes. She reports her right foot is numb for one week. In certain positions the right hand will be numb. . . . She has complained of irritability and crying . . .

IMPRESSION: This is a 41 year old white female with recent motor vehicle accident with previous history of known spinal cord syrinx. I doubt if the patient's current symptoms are on the basis of this syrinx. I feel that some of her symptoms may be secondary to an associated depression. I am going to start her on Prozac. . . .

(*Id.* at 217-218.)

Ms. Hawkins completed an Employee Sickness and Accident Report, dated April 10, 2001, describing her illness or accident as: "Car accident, Back & Neck Injury, Cyst in Spinal Cord." (Admin. R. at 154.) She indicated that April 1, 2001, was the date she was first unable to work. (*Id.*) Ms. Hawkins was seen for follow-up by Dr. Gilkison on

April 10, 2001, at which time her main complaints were “that her hands go numb at night, but once she changes position goes away. Her feet still feel numb. She has a burning sensation still at the base of her neck in the region of C7.” (Admin. R. at 175.)

Dr. d'Ambrosio examined Ms. Hawkins on May 3, 2001. At that time she reported “some increased low back pain. The pain medication does not seem to help . . . [and] increased numbness below her knees and in her hands for the last four weeks.” (Admin. R. at 346.) On examination, Dr. d'Ambrosio noted that Ms. Hawkins' sensation was “intact to vibration. She has decreased sensation to pinprick in her fingers only.” (*Id.*) He ordered another MRI, which was done on May 13, 2001. The MRI of the thoracic spine showed a syrinx from T3 to T12, with no “significant change” and no “abnormal enhancement.” (*Id.* at 352.)

On May 14, 2001, Dr. d'Ambrosio again examined Ms. Hawkins who complained of increased numbness in her hands, feet and sometimes her legs, and toe spasms at times. He observed: “Repeat of an MRI scan of the cervical spine revealed no change in the small syrinx C6 to T1. MRI scan of the thoracic spine reportedly showed no change in the syrinx in T3 to T12.” (Admin. R. at 344.) On examination he noted that she “has a decreased sensation to pinprick in the feet.” (*Id.*) Dr. d'Ambrosio wrote: “Our main concern is that the syrinx particularly in the lower thoracic spinal cord may be [a] factor in her symptoms and for this reason I would like to get her reevaluated by Dr. Henry Feuer of neurosurgery. I will await his opinion.” (*Id.*) On May 30, 2001, Dr. Feuer wrote Dr. d'Ambrosio:

Comparing her MRI scan in February to the most recent one, there is no change in the small syrinxes noted in the cervical or thoracic spinal cord. There is no evidence of spinal cord expansion. Examination remains quite unremarkable as you had noted also.

. . .

I doubt very much that there is any surgical treatment for the small cyst.

(Admin. R. at 319.) After a later review of the MRI scan with his partners, Dr. Feuer indicated on June 8, 2001, that “we feel very strongly that there are no indications for surgery on the small syrinxes.” (*Id.* at 210).

On July 18, 2001, Dr. Michael W. Groff, Director of Spinal Surgery, saw Ms. Hawkins for a neurological consultation. He examined her and noted that her “motor strength was normal throughout. Her sensory examination did in fact reveal a cape-like sensory deficit. Particularly, on the soles of her feet there was a distinct causalgia.” (Admin. R. at 364.) Dr. Groff also indicated that Ms. Hawkins’ MRI from May 2001 “demonstrated no significant neural compression and a moderate dilatation of the central canal in the lower cervical spine and . . . in the T9-T12 region . . . [which] does not represent the type of posttraumatic syrinx that would be a candidate for any kind of diversion procedure.” (*Id.*)

On July 30, 2001, Dr. Norman W. Oestrike, conducted a complete neurological exam of Ms. Hawkins and stated:

Detailed sensory examination showed normal light touch and pinprick over the nape and shoulders and up into the head.

She has some subjective decreased sensation in the right small finger and ulnar half of the ring finger. Otherwise, pinprick, light touch and vibration of the hands and feet were normal.

(Admin. R. at 163.) He noted that nothing in exam suggested Ms. Hawkins' "is in any kind of trouble from this syrinx. In fact, I think that most of her symptoms come from the whiplash and low back strain and it is unclear to me that any of her symptoms are coming from this syrinx." (*Id.*) He was impressed that she had, *inter alia*, low back strain, intermittent numbness of the hands and feet, and syringomyelia, and he recommended conservative treatment. (*Id.* at 163-64.) On August 12, 2001, Ms. Hawkins had a nerve conduction study to evaluate her complaints of hand numbness. (*Id.* at 326.) The results were normal. (*Id.*)

On August 30, 2001, Dr. Oestrike completed a Health Care Provider Medical Certification form in which he diagnosed Ms. Hawkins with syringomyelia based on findings of numbness and pain. (Admin. R. at 344.) Then, on September 25, 2001, Dr. Oestrike completed Prudential's disability claim form, diagnosing Ms. Hawkins with syringomyelia, extremity pain, and numbness/paresthesias. (*Id.* at 368.) He also indicated that the MRI showed syringomyelia. (*Id.*)

On October 30, 2001, Ms. Hawkins informed Prudential that her syringomyelia "[c]ondition remained stable until she was involved in another [motor vehicle accident] in Dec 00 . . . further testing which revealed that the syringomyelia had progressed." (*Id.*)

On November 27, 2001, Prudential spoke by phone with Mr. Webb, Ms. Hawkins' work supervisor, inquiring about the physical aspects of her job. (Admin. R. at 105).

Prudential reported that Mr. Webb had stated: “[O]ffice work. [R]equired phone and computer work, almost all sedentary. [L]ifting is minimal and [Plaintiff] is not required to lift anything substan[t]ial to complete reg[ular] occ[upational] duties. [Plaintiff] is able to move around as needed.” (*Id.*)

By letter dated December 6, 2001, Prudential informed Ms. Hawkins of its decision to deny her claim:

[T]he medical evidence in your file does not reveal any significant abnormality either in physical examination or in diagnostic studies that would support the inability to function at a level required in the performance of your regular occupation. Therefore, your LTD claim has been disallowed.

(Admin. R. at 55.) Prudential notified Ms. Hawkins of her right to appeal its decision. It said: “The appeal may identify the issues and provide other comments or additional evidence you wish considered, as well as any pertinent documents you may wish to examine.” (*Id.* at 56.)

Ms. Hawkins submitted a January 15, 2002 letter from Dr. Oestrike as additional medical evidence on appeal. The letter states in relevant part:

The patient’s medical complaint is that of pain and numbness. . . .

Based on the patient’s known neurological medical condition and the fact that the syrx can produce numbness, pain and symptoms that are position and activity dependent, it appears that this patient can not perform the duties of her job because of her medical condition.

This, of course, is based on her description of the job and her history of her pain and symptoms. They do correlate and are comparable with her physical findings and MRI scan findings.

It is my opinion that this patient is disabled for her current job and is likely disabled for any kind of meaningful and gainful employment. She can not work 8 hours a day because of the pain and limitations of her syringomyelia.

(Admin. R. at 259-60.) Dr. Oestrike's letter was the only additional medical evidence submitted on appeal. (*Id.* at 106.)

On March 20, 2002, Prudential noted that Dr. d'Ambrosio's records indicated a "normal physical examination and assessment that symptoms are not coming from syrxinx." (Admin. R. at 97.) Prudential concluded that Dr. d'Ambrosio's conclusions were well supported and that "Dr. Oestrike's opinion that the claimant cannot work appears to be based on the patient's self reported symptoms only." (*Id.*)

By letter dated March 22, 2002, Prudential notified Ms. Hawkins of its decision to uphold its decision and deny her appeal. (Admin. R. at 61-63).³ Prudential explained that "there is no evidence in the file indicating that you would not be capable of performing the duties of your occupation. . . ." (*Id.* at 62.) Prudential's letter noted that Dr. d'Ambrosio and Dr. Oestrike had concluded in March 2001 and July 2001, respectively, that Ms. Hawkins' symptoms did not appear to be coming from the syrxinx and that Dr. Feuer in May 2001 had noted that her examination was unremarkable.

³ Prudential claims that it concluded its March 22 letter by notifying Ms. Hawkins of her right to appeal. Ms. Hawkins does not dispute this assertion, but the court finds no such notification in the letter. In any event, Ms. Hawkins apparently was aware of her right to a second appeal since she did file a second appeal.

(Admin. R. at 62.)⁴ Prudential also noted Dr. Oestrike's January 15 letter in which he stated that his conclusions were based on Ms. Hawkins' description of her job and history of pain and symptoms, which were compatible with physical findings and MRI scans. (*Id.*)

On August 10, 2002, Ms. Hawkins appealed the denial of benefits a second time. (Admin. R. at 282-85.) She included a letter from Dr. d'Ambrosio, dated April 2, 2002, in which he stated that he "initially felt that the symptoms were the result of whiplash type injury . . . from the motor-vehicle accident with a superimposed depression," but now feels "there is a connection to the motor-vehicle accident in that the second motor-vehicle accident may well have aggravated the syrinx although this is not clear from the MRI scanning." (*Id.* at 261-62.) He qualified that, however, by stating that he had not seen her since July 17, 2001, though he had recommended that she follow-up with him: "Since I have not seen her, it is difficult for me to . . . give an accurate prognosis." (*Id.* at 262.)

Prudential requested Ms. Hawkins to attend an Independent Medical Evaluation ("IME") with Dr. James Fesenmeier, a neurologist. Dr. Fesenmeier performed an IME on Ms. Hawkins on October 15, 2002, and reviewed her medical records from Dr. d'Ambrosio, Dr. Oestrike and Dr. Michael Groff, including her MRI scans. (*Id.* at 252.) On sensory testing, Dr. Fesenmeier found:

⁴ Ms. Hawkins disputes that such an assertion regarding Drs. d'Ambrosio and Oestrike is made in the letter, but the record shows that it is. (Admin. R. at 62.) She is correct, though, that these doctors appear to have changed their earlier opinions later.

Ms. Hawkins' had mild loss to pinprick in the right hand in the area of her previous injury but otherwise pinprick was intact throughout. I looked for a pinprick loss over the shoulders and found none. I also found no sensory loss on the abdomen. Pinprick in the lower extremities was also normal.

(*Id.* at 253.) Dr. Fesenmeier noted that the MRI scans showed an enlargement of the central canal, but based on his examination, he believed Ms. Hawkins had hydromyelia, a harmless developmental anomaly, rather than syringomyelia. Dr. Fesenmeier reasoned that patients with hydromyelia have no neurologic deficits, whereas, patients with syringomyelia have, at the least, "a suspended sensory level to pin and temperature." (*Id.*) He stated:

I found no definite deficits on examination of Ms. Hawkins today. This is essentially the same as from Dr. d'Ambrosio and Dr. Oestrike. They have found mild variable decreased pinprick in the hands, but she has never had a true suspended sensory level. She definitely has no objective weakness or atrophy. Therefore, from a clinical standpoint. . . , it appears she has hydromyelia. . . . [T]his is not definitive, and she certainly could go on to develop neurologic symptoms, but since her syrinx has been apparently stable over a 10-year period, I think this is unlikely.

(Admin. R. at 253-54.) However, Dr. Fesenmeier also found that "Ms. Hawkins is disabled from working due to her persistent back pain and also because of her underlying depression." (*Id.* at 254.) He believed that her disability was temporary and recommended that she have physical therapy and/or work hardening program and psychological counseling. (*Id.*)

On December 3, 2002, Prudential denied Plaintiff's second appeal and again upheld its decision. (*Id.* at 70-73.) However, based on Dr. Fesenmeier's recommendations, Prudential approved LTD benefits for a closed period from October

1, 2001 through February 28, 2003, to allow Ms. Hawkins to complete the treatment plan recommended by Dr. Fesenmeier for her “persistent back pain and underlying depression.” (Admin. R. at 72.) Prudential’s letter to Ms. Hawkins quoted the Plan language regarding the 24-month benefit limitation for disabilities primarily based on self-reported symptoms and mental illness. (*Id.* at 71.) Ms. Hawkins was informed of her right to appeal to Prudential’s Appeals Committee. (*Id.* at 73.) She was advised that any such appeal “may identify the issues and provide other comments or additional evidence you wish considered” and that the decision of the Appeals Committee would be final and there would be no further appeal. (*Id.*)

On August 21, 2003, Ms. Hawkins by counsel submitted her third and final appeal. (Admin. R. at 231.) She indicated that she “still suffers from Major Depressive Disorder,” “is still psychologically disabled,” and “is still physically disabled and incapable of performing any work.” (*Id.*) She also provided Prudential with additional medical records. Prudential arranged to have Dr. Fesenmeier review the medical records and submit an addendum report.

Dr. Fesenmeier reviewed Ms. Hawkins’ medical records, noting that they “contain very little new information than when I performed my [IME]” the year before. (Admin. R. at 123.) In his report, dated October 13, 2003, Dr. Fesenmeier comments on the findings from Ms. Hawkins’ March 26, 2003 psychological evaluation and Dr. Oestrike’s report of his examination of Ms. Hawkins on July 3, 2003. In particular, Dr. Fesenmeier said that Dr. Oestrike had noted that Ms. Hawkins “was having more spasms than before,” “was having ‘a lot of pain,’” and had a “decrease to pinprick in the right arm[.]”

(*Id.*) He also noted Dr. Oestrike's conclusion that Ms. Hawkins "has a dissociated pinprick loss, secondary to syringomyelia since vibration was intact in all four extremities." (*Id.*) The following opinion was offered by Dr. Fesenmeier:

It is impossible for me to make a conclusion as to whether or not the patient is disabled. I can only comment on her objective findings. She clearly has enlargement of the central canal of the spinal cord, which has been stable over approximately ten years. Her contention of disability is based primarily on the subjective complaint of pain, as well as her depression. I can certainly see her again, but to be honest I do not think this would allow any more degree of certainty, since her complaint of disability is based on subjective complaints. . . . Certainly, if she truly has a syrinx, this can cause pain, but she has little objective findings on examination to support a symptomatic syringomyelia.⁵ She has been treated for her depression . . . , but it seems she has not responded well . . . and it appears, based on the record, that she still is depressed, and this alone may be disabling her.

(Admin. R. at 123.)

On October 30, 2003, Prudential reinstated Ms. Hawkins' benefits from March 1, 2003 through September 31, 2003. (*Id.* at 83-85.) Prudential wrote: "Based on Dr. Fesenmeier's IME addendum from October 2003, it was determined that Ms. Hawkins [sic] contention of disability is based on subjective complaints of pain and that she continues to remain disabled based on her symptoms of depression." (*Id.* at 85.) Prudential therefore determined that the self-reported symptoms provision applied and terminated benefits effective October 1, 2003, based on the provision. (*Id.*) Prudential

⁵ Ms. Hawkins argues that this implies that Dr. Fesenmeier examined her in October 2003. The court disagrees. It is reasonably clear that Dr. Fesenmeier was commenting on the findings made by others.

advised Ms. Hawkins that her claim had reached the final level of appeal and “[t]he decision on her claim is now final and cannot be further appealed.” (*Id.*)

The Plan contains the following language which Prudential contends grants it discretion: First, from the section regarding “How Does Prudential Define Disability?”:

You are disabled when Prudential determines that:

- you are unable to perform the **material and substantial duties** of your regular occupation due to your **sickness** or **injury**; and
- you have a 20% or more loss in your **indexed monthly earnings** due to that **sickness** or **injury**.

After 24 months of payments, you are disabled when Prudential determines that due to the same sickness or injury, you are unable to perform the duties of any **gainful occupation** for which you are reasonably fitted by education, training or experience.

[. . .]

[Prudential] may require you to be examined by doctors, other medical practitioners or vocational experts of our choice . . . [Prudential] can require examinations as often as it is reasonable to do so.

(Admin. R. at 17). Second, from the section describing what information is needed as proof of a claim:

[Prudential] may request that you send proof of continuing disability, satisfactory to Prudential, indicating that you are under the regular care of a doctor.

(*Id.* at 29). Finally, the section regarding disabilities with a limited pay period states:

Disabilities due to a sickness or injury which, as determined by Prudential, are primarily based on **self-reported symptoms** have a limited pay period during your lifetime.

Disabilities which, as determined by Prudential, are due in whole or part to **mental illness** also have a limited pay period during your lifetime.

The limited pay period for self-reported symptoms and mental illness combined is 24 months during your lifetime.

. . .

Self-reported symptoms means the manifestations of your condition, which you tell your doctor, that are not verifiable using tests, procedures and clinical examinations standardly accepted in the practice of medicine. Examples of self-reported symptoms include . . . pain, fatigue . . . numbness . . .

Mental illness means a psychiatric or psychological condition regardless of cause. Mental illness includes . . . depression.

(Admin. R. at 25-26.)

II. DISCUSSION

Ms. Hawkins brings this action under ERISA, specifically 29 U.S.C. § 1132. An ERISA participant or beneficiary can sue to recover benefits due under an ERISA plan, to enforce her rights under the plan, or to clarify her rights to future benefits. 29 U.S.C. § 1132(a)(1)(B). A party is entitled to summary judgment when “there is no genuine issue of material fact and . . . she is entitled to judgment as a matter of law.” *Ruiz v. Cont’l Cas. Co.*, 400 F.3d 986, 989 (7th Cir. 2005); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On cross-motions, the court construes the record and all inferences in favor of the party against whom the motion being considered is made. *Tegtmeier v. Midwest Oper. Eng’rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004).

A. Standard of Review

The parties dispute the applicable standard under which the court reviews Prudential's decision to terminate Ms. Hawkins' benefits. "Ordinarily, a denial of benefits will be reviewed de novo unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Ruiz v. Cont'l Cas. Co.*, 400 F.3d 986, 989 (7th Cir. 2005); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). There is a presumption that the benefits determination will be reviewed de novo. See *Perugini-Christen v. Homestead Mortg. Co.*, 287 F.3d 624, 626 (7th Cir. 2002). When deciding whether a plan grants the plan administrator discretionary authority, the court examines the plan language. *Id.* If the plan language "indicates with the requisite if minimum clarity that a discretionary determination is envisaged then a denial of benefits will be reviewed under an arbitrary and capricious standard." *Ruiz*, 400 F.3d at 989 (quotations and citations omitted). In asserting that the Plan granted it the necessary discretion, Prudential relies on the language which states that an individual is disabled "when Prudential determines" she is disabled and the provision which states that certain disabilities which "as determined by Prudential" are primarily based on self-reported symptoms or are due in whole or in part to mental illness have a limited pay period under the plan. Prudential also relies on its right to require examinations by doctors and others as well as the language regarding its right to request proof of continuing disability.

It is clear that most of this language fails to grant discretionary authority necessary for deferential review. The Seventh Circuit has held:

[T]he mere fact that a plan requires a determination of eligibility or entitlement by the administrator, or requires proof or satisfactory proof of the applicant's claim, or requires both a determination and proof (or satisfactory proof), does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being discretionary.

Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000); *see also id.* at 331

("the presumption of plenary review is not rebutted by the plan's stating merely that benefits will be paid only if the plan administrator determines that they are due, or only if the applicant submits satisfactory proof of his entitlement to them"); *accord Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 109 (2^d Cir. 2005) (holding language stating that a disability "exists when Prudential determines that all of these conditions are met" and lists specific conditions did not vest discretion in plan administrator). The court reasoned:

Obviously a plan will not--could not, consistent with its fiduciary obligation to the other participants--pay benefits without first making a determination that the applicant was entitled to them. The statement of this truism in the plan document implies nothing one way or the other about the scope of judicial review of his determination, any more than our statement that a district court "determined" this or that telegraphs the scope of our judicial review of that determination. That the plan administrator will not pay benefits until he receives satisfactory proof of entitlement likewise states the obvious, echoing standard language in insurance contracts not thought to confer any discretionary powers on the insurer.

Herzberger, 205 F.3d at 332. Other jurisdictions have held that language stating a claimant is disabled "when Prudential [or other administrator] determines" he or she meets specified criteria and variations on such language confer discretionary authority on the administrator, e.g., *Simone v. Prudential Ins. Co. of Am.*, No. 04 Civ.2076(DLC),

2005 WL 475406, at *6 & n.4 (S.D.N.Y. Feb. 28, 2005), but these decisions are contrary to *Herzberger* which this court is bound to follow. Therefore, following *Herzberger*, the court concludes that the language stating “You are disabled when Prudential determines. . .” and that a limited pay period exists for disabilities due to sickness or injury which “as determined by Prudential” are primarily based on self-reported symptoms or due to mental illness are insufficient to grant the requisite discretionary authority and result in deferential review.

Potentially more troubling is the “satisfactory to Prudential” language regarding what proof of a continuing disability may be required. In *Donato v. Metropolitan Life Insurance Co.*, the payment of benefits was conditioned on submission to the administrator of proof “satisfactory to us,” which the court held indicated a grant of discretionary authority. 19 F.3d 375, 379-80 (7th Cir. 1994) (citing *Bali v. Blue Cross & Blue Shield Ass’n*, 873 F.2d 1043, 1047 (7th Cir. 1989)). More recently, in *Herzberger*, the Seventh Circuit exemplified the language in *Donato* as that which indicated with the requisite, if minimum, clarity that a subjective, discretionary determination was envisioned. 205 F.3d at 331-32. Thus, following cases such as *Herzberger* and *Donato*, the “satisfactory to Prudential” language may convey discretionary authority to the plan administrator. However, this does not carry the day for Prudential.

In the court’s view, reliance solely on this language to justify deferential review in this case is problematic. In *Nichols v. Prudential Insurance Co. of America*, 406 F.3d 98 (2nd Cir. 2005), the Second Circuit considered whether the plan granted the plan administrator discretion and, if so, whether there was any action by the administrator to

which the court could defer. The plaintiff's claim for benefits was deemed denied based on the plan administrator's failure to meet certain regulatory deadlines. *Id.* at 105. The court first held that the language stating a disability "exists when Prudential determines" certain conditions are met did not grant discretion to Prudential. *Id.* at 109. In the alternative, the court held that even if Prudential were granted discretion, "it made no valid exercise of that discretion here." *Id.* As support, the Second Circuit looked directly to *Firestone's* reasoning. *Id.* ("*Firestone* derived its holding from principles of trust law that "make a deferential standard of review appropriate when a trustee exercises discretionary powers.") (citing 489 U.S. at 111). The Supreme Court had written:

Firestone concludes that an ERISA plan administrator, fiduciary, or trustee is empowered to exercise all his authority in a discretionary manner subject only to review for arbitrariness and capriciousness. But the provisions relied upon so heavily by Firestone do not characterize a fiduciary as one who exercises entirely discretionary authority or control. Rather, one is a fiduciary to the extent he exercises any discretionary authority or control.

Firestone, 489 U.S. at 113. In light of this reasoning, the Second Circuit concluded that deferential review applied only when the administrator actually exercised discretion. *Nichols*, 406 F.3d at 109. The court held that a "deemed denied" claim was not denied by any exercise of discretion, but rather, by operation of law such that de novo review was appropriate. *Id.*

Prudential takes a position like that rejected in *Nichols*: It argues that since the Plan granted it discretion with respect to certain decisions, it was granted discretion as to all decisions. *Nichols* as well as *Firestone's* reasoning shows this to be incorrect.

Ms. Hawkins' benefits were terminated based on the Prudential's determination that her claim was based on subjective complaints of pain and symptoms of depression and its application of the benefit limitation provisions for self-reported symptoms and mental illness. (See *e.g.*, Admin. R. at 85.) Thus, even though Prudential had discretionary authority to determine whether proof of continuing disability was satisfactory, it did not exercise that discretion in deciding to terminate Ms. Hawkins' benefits. Similarly, the final plan provision on which Prudential relies in asserting it had discretion was not implicated by its decision to terminate benefits. Even if this provision confers discretion on Prudential, Ms. Hawkins' benefits were not terminated based on her failure to subject herself to an examination when required by Prudential.

The Plan's self-reported symptoms and mental illness provisions the application of which resulted in the termination of Ms. Hawkins' benefits do not grant Prudential discretionary authority. Accordingly, the court concludes that Prudential's decision to terminate benefits is reviewed *de novo*. But even if the court should review Prudential's decision deferentially, the result would be the same.

Other district courts in the Seventh Circuit have concluded that identical language regarding proof of continuing disability grants discretionary authority without regard to whether or not that provision was relied upon in denying or terminating benefits. See *Schwartz v. Prudential Ins. Co. of Am.*, No. 04 C 2377, 2005 WL 576857, at *4 (N.D. Ill. Mar. 8, 2005); *Chimmy v. Prudential*, No. 03 C 6628, 2004 U.S. Dist. LEXIS 23516, at *4 (N.D. Ill. Nov. 19, 2004); *Diaz v. Prudential Ins. Co. of Am.*, No. 03 C 2702, 2004 WL 1094441, at *7 (N.D. Ill. May 13, 2004); *DiPietro v. The Prudential Ins.*

Co. of Am., No. 03 C 1018, 2003 WL 22159467, at *2 (N.D. Ill. Sept. 17, 2003). These decisions are unpersuasive in light of *Firestone* and *Nichols*. And, the other cases relied upon by Prudential are inapposite and distinguishable. See, e.g., *Dabertin v. HCR Manor Care, Inc.*, 373 F.3d 822 (7th Cir. 2004) (where it was undisputed that the plan at issue gave the plan administrator the requisite discretion); *Trustmark Ins. Co. v. Schuchman*, No. 99-1081 C T/K, 2003 U.S. Dist. LEXIS 9315, at *9-10 (S.D. Ind. June 2, 2003) (where the plan clearly conveyed discretion to determine questions under the plan, including interpretation). So, the court reviews the termination decision de novo.

B. Review of Prudential's Decision

Prudential contends that its decision to terminate benefits must be upheld even under de novo review. It argues that Ms. Hawkins' medical records show that it reasonably determined her symptoms were self-reported and/or the result of depression and that she has not pointed to any medical records to show otherwise. Ms. Hawkins, for her part, contends that Prudential's termination of benefits was wrongful because: (1) it had no medical records regarding her medical condition as of October 1, 2003, the date benefits were terminated; (2) she was denied a full and fair review of her claim; (3) Prudential did not reasonably rely on Dr. Fesenmeier's IME addendum; and (4) syringomyelia is diagnosed by objective tests and clinical examinations such that the self-reported symptoms provision is inapplicable.

Plaintiff first argues that Prudential wrongfully terminated benefits in violation of the Plan language because it decided she was no longer disabled as of October 30,

2003, without any medical evidence regarding her physical status on that date.

Prudential's denial letter of December 6, 2001, advised Ms. Hawkins of her right to appeal and her right to submit additional evidence for consideration. Ms. Hawkins appealed and submitted a January 15, 2002, letter from Dr. Oestrike as support. Her first appeal was denied and the decision to deny benefits upheld as indicated in Prudential's letter of March 22, 2002. That letter discusses Dr. Oestrike's January 15 letter, thus indicating Prudential's consideration of this evidence submitted on appeal. Though the record does not establish that Prudential's March 22 letter advised Ms. Hawkins of her right to further appeal and submit additional evidence in support of her claim, she nevertheless did appeal a second time and submitted a letter from Dr. d'Ambrosio as support. Then, on Prudential's request, she underwent an IME with Dr. Fesenmeier. Seeking independent expert advice is evidence of a thorough investigation. *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1148 (7th Cir. 1998) (finding that insurer did not act arbitrarily and capriciously partly because the insurer obtained independent expert advice); *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 345 (4th Cir. 2000) (concluding that administrative committee acted reasonably in process of reviewing denial of claim for benefits in seeking two medical reviews by independent doctors of prior decision and claimant's medical file); see also *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 827 (2003) (concluding that the insurer's reliance on the opinion of an independent neurologist who examined the claimant was reasonable, despite different opinion of claimant's treating physician). As a result of the IME and Dr. Fesenmeier's recommendation, Prudential awarded Ms. Hawkins LTD benefits for a closed period. Prudential's letter, dated

December 3, 2002, informed Ms. Hawkins of her right to appeal to the Appeals Committee and submit comments and additional evidence she wished to have considered on appeal. The letter further advised her that the Appeals Committee was the final level of review whose decision would be final and could not be appealed. Indeed, Ms. Hawkins made a third appeal on August 21, 2003, and submitted additional medical records.

Thus, the record establishes that Prudential informed Ms. Hawkins of her right to appeal its decisions denying benefits and her right to submit additional comments and evidence on appeal. She did just that, and the record discloses that Prudential considered the additional information and evidence she submitted. For example, Prudential's final decision refers to additional medical records from Mrs. Crissman, Dr. O'Brien, Dr. Oestrike (including offices notes from July 3, 2003), and Dr. Gildson as well as Ms. Hawkins' August 2003 appeal letter. So it seems that even if Prudential's final decision was made without the benefit of the most up-to-date medical records regarding Ms. Hawkins, she bears some responsibility. Furthermore, the Appeals Committee obviously required some time to review Ms. Hawkins' third appeal, including her file and medical records. It does not seem that the time taken to review her appeal and render a decision was unreasonable. If Ms. Hawkins had acquired more current medical information about her medical condition during the pendency of her appeal, she could, and presumably would, have submitted it. Moreover, Prudential terminated benefits based on its decision that Ms. Hawkins' disability was based on her subjective complaints of pain and symptoms of depression such that the limited pay period for

such disabilities applied to her claim; that 24-month period expired on September 30, 2003. Prudential did not stop paying Ms. Hawkins benefits because it had determined that she was no longer disabled on October 1, 2003. Thus, Prudential decided she was no longer disabled under the terms of the Plan.

Plaintiff next contends that Prudential violated its duty to provide her a full and fair review because she was not afforded the opportunity to challenge Dr. Fesenmeier's opinions in his IME addendum. As noted, Ms. Hawkins' claim for LTD benefits was initially denied by letter dated December 6, 2001. Prudential's letter complied with 29 U.S.C. § 1133: It provided adequate notice to Ms. Hawkins of the specific reasons for the denial of her claim in an understandable manner, and afforded her a reasonable opportunity for a full and fair review. Prudential had three levels of review, and Ms. Hawkins availed herself of all three. She submitted additional evidence to support her claim for benefits, and Prudential considered such evidence as well as her other submissions on appeal. In fact, on her second appeal, Prudential arranged for an IME by Dr. Fesenmeier and, on his recommendation, awarded her LTD benefits for a closed period. When that period ended, Ms. Hawkins appealed again, submitting a letter and additional medical records. Prudential responded by arranging to have Dr. Fesenmeier review the medical records and submit an addendum report. In addition, Prudential's letters to Ms. Hawkins denying her claim and appeals provided her with the reasons for its decisions.

Thus, Prudential's internal appeals process seems to have complied with 29 C.F.R. § 2560.503-1(g)(1) (requiring internal review procedure to allow a claimant or

representative to “(i) Request a review upon written application to the plan; (ii) Review pertinent documents; and (iii) Submit issues and comments in writing.”). The review process provided in this case is like that provided in cases such as *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*, 797 F.2d 521 (7th Cir. 1986), which the court found satisfied the full and fair review requirements. The record reveals that Ms. Hawkins received meaningful and effective review of Prudential’s decision to deny benefits—though initially denied all benefits, she was awarded benefits on review--and she was able “to prepare adequately for any further administrative review, as well as appeal to the federal courts.” *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 689 (7th Cir. 1992) (quotation omitted).

Ms. Hawkins argues that Defendant unreasonably relied on Dr. Fesenmeier’s opinion because he did not contradict her treating physicians’ opinions that she has syringomyelia. She also argues that syringomyelia is diagnosed by objective tests and clinical examinations and was so diagnosed in her case in particular. These matters are beside the point. Though one could understand Dr. Fesenmeier’s IME addendum as questioning whether Ms. Hawkins has syringomyelia, and in his original IME report he concluded she did not, his opinion that her disability arose from her self-reported symptoms is unchallenged and correct. A syrinx is a cyst within the spinal cord. Syringomyelia is a complication which may develop and if it does, develops as the cyst fills with fluid and expands. (See Admin. R. at 305 (“Although more than half of all people with SCI [spinal cord injury] develop a cyst in the spinal cord at the injury site, only about 4% develop syringomyeylia [sic], in which the cysts fills with fluid and

expands.”)) While a *syrinx* can be diagnosed by MRI, it does not follow that every person with a syringomyelia suffers from syringomyelia. (See *id.*) Additional tests such as strength tests and nerve conduction tests may be used to diagnose syringomyelia. (Admin. R. at 300, 305.) Furthermore, syringomyelia seems like many other diseases in an important respect: sometimes the disease is disabling; sometimes, it is not. Syringomyelia may be objectively verifiable by objective tests or clinical examinations; the intensity, severity and frequency of symptoms of syringomyelia such as pain, however, do not appear to be.

The decisive question before Prudential and this court is not whether Ms. Hawkins suffers from syringomyelia, but whether her claimed inability to perform work is because of her self-reported symptoms and mental illness. The court accepts that Ms. Hawkins’ treating physicians diagnosed her with syringomyelia and performed objective tests and clinical examinations which may have shown that their opinions are well-supported. Nonetheless, it remains that (other than depression) it is Ms. Hawkins’ pain and perhaps other self-reported symptoms, on which she bases her claim of disability. Ms. Hawkins identifies no test or examination which has objectively quantified or qualified her pain. The pain experienced in a particular case of syringomyelia appears to be subjective.

Ms. Hawkins takes issue with Dr. Fesenmeier’s conclusion that she has “little objective findings on examination to support a symptomatic syringomyelia.” (Admin. R. at 123.) From this conclusion, she infers that he selectively reviewed her medical records, which she argues results in a violation of an ERISA regulation, see 29 C.F.R. § 2560.503-1(h)(2)(iv) (prohibiting selective review of a claimant’s information on appeal of

an adverse benefit determination). In reality, Ms. Hawkins just disagrees with the conclusions Dr. Fesenmeier draws from her records. Though the IME addendum specifically references only Dr. Oestrike's report of examination on July 3, 2003, it appears that Dr. Fesenmeier considered all of Ms. Hawkins' records. He states in his addendum report: "The records sent to me contain very little new information than when I performed my Independent Medical Examination one year ago." (Admin. R. at 123.) It seems the doctor could not have made this statement unless he compared the newly submitted records to the information available to him when he performed the IME. The reports of examinations of Dr. d'Ambrosio (May 3 and 14, 2001), and Dr. Groff (July 18, 2001), cited by Ms. Hawkins, were made available to Dr. Fesenmeier at the time of his IME in October 2002; Dr. Feuer's report of March 12, 2001 was not. Much like Dr. d'Ambrosio and Dr. Oestrike, Dr. Fesenmeier found Ms. Hawkins to have decreased sensation to pinprick in her right arm. However, in contrast with the examination reports of Dr. d'Ambrosio, Dr. Groff, *and Dr. Feuer*, Dr. Fesenmeier found no pinprick loss over her shoulders or lower extremities. According to Dr. Fesenmeier, he "found no definite deficits on examination of Ms. Hawkins" and further, based on the reports of examinations from her treating physicians, he concluded that she has "never had a true suspended sensory level." (Admin. R. at 253.) It seems that Ms. Hawkins is not claiming she is disabled based on decreased sensation, even though that may be a factor in her overall condition. But even if Dr. Fesenmeier's conclusion that Ms. Hawkins' "has little objective findings on examination to support a symptomatic syringomyelia" is wrong, the fact remains that her claim of disability is based on her perception of pain and

her depression—both of which fall under the Plan’s self-report and mental illness limited benefits provisions.

The court has reviewed the administrative record de novo and, based on its review, upholds Prudential’s decision to terminate Ms. Hawkins’ LTD benefits based on the self-reported and mental illness limited pay period provisions. Though MRIs revealed Ms. Hawkins’ cervical and thoracic syringes, the syringes were described as small and narrow. The MRIs revealed minimal degenerative changes, no appreciable change in the cervical syrinx, and no evidence of thoracic cord impingement or other abnormal cord signals. Based on the February 21, 2001 MRI, neurologist Dr. Feuer concluded that the “narrow syrinx noted in the thoracic spinal cord is of no clinical significance.” (Admin. R. at 220.) Dr. D’Ambrosio similarly concluded on March 28, 2001: “I doubt if the patient’s current symptoms are on the basis of this syrinx.” These records predate Ms. Hawkins’ claimed disability onset date of April 1, 2001. A subsequent MRI on May 13, 2001, revealed no change in the cervical or thoracic syringes. (Admin. R. at 344, 352.) Because Dr. d’Ambrosio had some concern at that time (May 2001), that Ms. Hawkins’ thoracic syrinx may be a factor in her symptoms, he had her evaluated by Dr. Feuer who, on reviewing the February and May 2001 MRIs and examining Ms. Hawkins, concluded that there was no change in the syringes, no spinal cord expansion and her examination was “quite remarkable.” (*Id.* at 319.) In July 2001, Dr. Groff reviewed Ms. Hawkins’ May MRI and concluded that it showed “no significant neural compression” and “a moderate dilatation of the central canal.” (Admin. R. at 364.) He examined Ms. Hawkins and, though she had some sensory deficits, he noted that her

“motor strength was normal throughout.” (*Id.*) Both Dr. Feuer and Dr. Groff believed that surgery was not indicated. Likewise, later that month, Dr. Oestrike concluded, after examining Ms. Hawkins, that her sensory examination was normal. (*Id.* at 163.) Like the other physicians, Dr. Oestrike doubted that Ms. Hawkins’ symptoms were coming from her syrinx, and this, despite his diagnosis of syringomyelia.

In January 2002, Dr. Oestrike opined that Ms. Hawkins could not perform the duties of her job because of “pain and limitations of her syringomyelia.” (Admin. R. at 260.) He qualified his opinion by stating: “This, of course, is based on her description of the job and her history of her pain and symptoms” while noting that her claims correlated with and were comparable with her physical findings and MRI findings. (*Id.*) Later in April of that year, Dr. d’Ambrosio expressed a belief that Ms. Hawkins’ second motor vehicle accident may have aggravated her syrinx. However, he acknowledged “this is not clear from the MRI scanning” and that he had not seen Ms. Hawkins since July 2001—even though he had recommended follow-up. (Admin. R. at 261-62.) Then in October that year, Dr. Fesenmeier personally examined Ms. Hawkins and noted that he “found no definite deficits on examination . . . today” which he described as “essentially the same as from” her treating physicians, Dr. d’Ambrosio and Dr. Oestrike. (*Id.* at 253.) He found “no objective weakness or atrophy” and doubted that she would develop neurologic symptoms from her syrinx. (*Id.* at 254.) Even assuming that Dr. Fesenmeier erred in concluding that his examination results were essentially the same as Ms. Hawkins’ treating physicians, “ERISA does not require plan administrators to accord special deference to the opinions of treating physicians.” *Kobs v. United Wis. Ins. Co.*,

400 F.3d 1036, 1039 (7th Cir. 2005) (citing *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) (rejecting importation of “treating physician” rule from Social Security context)).

On Ms. Hawkins’ third appeal, she submitted additional medical records and information. Prudential had requested that Dr. Fesenmeier review these records and submit an addendum report. Ms. Hawkins complains that Dr. Fesenmeier did not examine her around the time he prepared his IME addendum. This is correct. However, he had examined her within the year. Thus, he is not a mere consultant who never examined Ms. Hawkins. Furthermore, Dr. Fesenmeier reviewed the additional medical records submitted by Ms. Hawkins on appeal, and noted that they contained very little new information, and therefore, he did not believe that another examination was necessary. Dr. Fesenmeier said that based on objective findings, Ms. Hawkins’ “clearly has enlargement of the central canal of the spinal cord, which has been stable over approximately ten years.” (Admin. R. at 123.) He expressly stated that “she has little objective findings on examination to support a symptomatic syringomyelia” and concluded that “her contention of disability is based primarily on the subjective complaint of pain, as well as her depression,” “her complaint of disability is based on subjective complaints,” and her depression “alone may be disabling her.” (*Id.*)

It was reasonable for Prudential to rely on these opinions of Dr. Fesenmeier in making its decision regarding Ms. Hawkins’ claim for benefits. See *Nord*, 538 U.S. at 827 (concluding insurer’s reliance upon opinion of independent neurologist who examined the claimant was reasonable, despite differing opinions from claimant’s

treating physician). Given these clear opinions of Dr. Fesenmeier, an independent and seemingly well-qualified neurologist, it was reasonable for Prudential to determine that Ms. Hawkins' claim of disability was based primarily on self-reported symptoms and symptoms of depression. It therefore follows that it was reasonable for Prudential to conclude that the limited pay period provisions for self-reported symptoms and mental illness applied to Ms. Hawkins' disability claim. Because she had been awarded benefits for the period beginning October 1, 2001, it was reasonable for Prudential to determine that her benefits should be terminated effective October 1, 2003, upon expiration of the 24-month period. Accordingly, the court finds that Prudential's decision to terminate benefits should be upheld.

III. CONCLUSION

The Defendant's Motion for Summary Judgment (Dkt. No. 36) will be **GRANTED** and the Plaintiff's Cross-Motion for Summary Judgment (Dkt. No. 40) will be **DENIED**.
An appropriate judgment will be entered.

ALL OF WHICH IS ENTERED this 2nd day of August 2005.

John Daniel Tinder, Judge
United States District Court

Electronic copies to:

Andrew W. Hull
Hoover Hull Baker & Heath LLP
awhull@hooverhull.com

Jason Michael Kuzniar
Wilson Elser Moskowitz Edelman & Dicker LLP
kuzniarj@wemed.com

Daniel John McMahon
Wilson Elser Moskowitz Edelman & Dicker, LLP
mcmahond@wemed.com

Alice McKenzie Morical
Hoover Hull Baker & Heath LLP
amorical@hooverhull.com

Christian Novay
Wilson Elser Moskowitz Edelman & Dicker
novayc@wemed.com

Ronald E. Weldy
Abrams & Weldy
weldy@abramsweldy.com